

Opinions of the Arbitration Commission of the International Conference on the Former Yugoslavia (“Badinter Commission”)

Opinion No. 1, 29.11.1991

The President of the Arbitration Committee received the following letter from Lord Carrington, President of the Conference on Yugoslavia, on 20 November 1991:

We find ourselves with a major legal question.

Serbia considers that those Republics which have declared or would declare themselves independent or sovereign have seceded or would secede from the SFRY which would otherwise continue to exist.

Other Republics on the contrary consider that there is no question of secession, but the question is one of a disintegration or breaking-up of the SDRY as the result of the concurring will of a number of Republics. They consider that the six Republics are to be considered equal successors to the SFRY, without any of them or group of them being able to claim to be the continuation thereof.

I should like the Arbitration Committee to consider the matter in order to formulate any opinion or recommendation which it might deem useful.

The Arbitration Committee has been apprised of the memoranda and documents communicated respectively by the Republics of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Slovenia, Serbia, and by the President of the collegiate Presidency of the SFRY.

1) The Committee considers:

a) that the answer to the question should be based on the principles of public international law which serve to define the conditions on which an entity constitutes a state; that in this respect, the existence or disappearance of the state is a question of fact; that the effects of recognition by other states are purely declaratory;

b) that the state is commonly defined as a community which consists of a territory and a population subject to an organized political authority; that such a state is characterized by sovereignty;

c) that, for the purpose of applying these criteria, the form of internal political organization and the constitutional provisions are mere facts, although it is necessary to take them into consideration in order to determine the Government's way over the population and the territory;

d) that in the case of a federal-type state, which embraces communities that possess a degree of autonomy and, moreover, participate in the exercise of political power within the framework of institutions common to the Federation, the existence of the state implies that the federal organs represent the components of the Federation and wield effective power;

e) that, in compliance with the accepted definition in international law, the expression 'state succession' means the replacement of one state by another in the responsibility for the international relations of territory. This occurs whenever there is a change in the territory of the state. The phenomenon of state succession is governed by the principles of international law, from which the Vienna Conventions of 23 August 1978 and 8 April 1983

have drawn inspiration. In compliance with these principles, the outcome of succession should be equitable, the states concerned being free of terms of settlement and conditions by agreement. Moreover, the peremptory norms of general international law and, in particular, respect for the fundamental rights of the individual and the rights of peoples and minorities, are binding on all the parties to the succession.

2) The Arbitration Committee notes that:

a) - although the SFRY has until now retained its international personality, notably inside international organizations, the Republics have expressed their desire for independence;

- in Slovenia, by a referendum in December 1990, followed by a declaration of independence on 25 June 1991, which was suspended for three months and confirmed on 8 October 1991;

- in Croatia, by a referendum held in May 1991, followed by a declaration of independence on 25 June 1991, which was suspended for three months and confirmed on 8 October 1991;

- in Macedonia, by a referendum held in September 1991 in favour of a sovereign and independent Macedonia within an association of Yugoslav states;

- in Bosnia and Herzegovina, by a sovereignty resolution adopted by Parliament on 14 October 1991, whose validity has been contested by the Serbian community of the Republic of Bosnia and Herzegovina.

b) - The composition and workings of the essential organs of the Federation, be they the Federal Presidency, the Federal Council, the Council of the Republics and the Provinces, the Federal Executive Council, the Constitutional Court or the Federal Army, no longer meet the criteria of participation and representatives inherent in a federal state;

c) - The recourse to force has led to armed conflict between the different elements of the Federation which has caused the death of thousands of people and wrought considerable destruction within a few months. The authorities of the Federation and the Republics have shown themselves to be powerless to enforce respect for the succeeding ceasefire agreements concluded under the auspices of the European Communities or the United Nations Organization.

3) - Consequently, the Arbitration Committee is of the opinion:

- that the Socialist Federal Republic of Yugoslavia is in the process of dissolution;

- that it is incumbent upon the Republics to settle such problems of state succession as may arise from this process in keeping with the principles and rules of international law, with particular regard for human rights and the rights of peoples and minorities;

- that it is up to those Republics that so wish, to work together to form a new association endowed with the democratic institutions of their choice.